



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr V Martin

**Respondent:** Garvey's Promenade Hotel

**Heard at:** Manchester

**On:** 25 October 2019

**Before:** Employment Judge Phil Allen  
(sitting alone)

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr D Garvey

# JUDGMENT

The judgment of the Tribunal is that:

1. The respondent has made an unauthorised deduction from the claimant's wages and is ordered to pay the claimant the gross sum of £178.
2. The claimant was dismissed in breach of contract and has not been recompensed for the loss of bonus which he would have earned during the notice period. The respondent is ordered to pay damages to the claimant in the sum of £1,200.
3. The respondent has failed to pay the claimant in lieu of accrued but untaken annual leave and is ordered to pay the claimant the sum of £300.

# REASONS

1. The claimant was employed by the respondent as a Hotel Manager from 1 March 2017 until his dismissal on 16 October 2018. The claims which the Employment Tribunal were required to consider were for unlawful deductions from wages, breach of contract and in relation to annual leave.
2. The claimant and the respondent had strongly held views about issues arising from, and relating to, the claimant's conduct whilst employed and the timing and

manner of his dismissal. The Employment Tribunal did not need to consider these issues to determine the claims brought. This was made clear to the parties during the hearing, as only evidence which was relevant to the issues was considered. The claimant's claims for unfair dismissal and for a statutory redundancy payment had been struck out on 12 February 2019 as he did not have two years' service.

### **The Hearing**

3. The claimant represented himself at the hearing. The respondent was represented by Mr Daniel Garvey, who described himself as the former owner of the respondent.

4. The Employment Tribunal heard evidence from the claimant and Mr Garvey, who had prepared a statement in advance of the hearing. Both parties had brought a small number of documents to the hearing and they were referred to and considered by the Tribunal.

5. In his claim form, the claimant had provided details of the amounts that he claimed he was due. In summary, he contended that he should have been paid £5,428.66 for August and September 2018, but in fact received only £2,350. He therefore contended that the respondent had not paid him a total of £3,078.66 which was otherwise due. The amounts claimed were based upon the following:

- a. £490 wages due for August and £500 wages due for the period of September prior to termination;
- b. £450 bonus due for the period for which he was employed in September 2018;
- c. £1,500 for holiday accrued but not taken in the year 1 July 2017 to 30 June 2018;
- d. £288.66 for holiday accrued but not taken to termination, in a holiday year stated to commence on 1 July 2018;
- e. £1,000 redundancy pay; and
- f. £1,200 bonus for bookings made where the occupancy would take place in the period between 16 September and 16 October 2018.

6. The respondent's position was that the claimant had received all payments to which he was entitled.

### **Facts**

#### *Documents*

7. The claimant was initially employment on a statement of terms and conditions which was signed by him on 26 May 2017. That document records that he is entitled to a basic salary of £12,000 per year. It records that:

*“In addition to your salary, you will receive the following performance salary based upon the customer hotel bed nights, being £2 per night per pre-booked customer and £4 per night per walk-in customer.”*

8. The contract records that the holiday leave year runs from 1 January to 31 December and that the claimant is entitled to 21 days' holiday plus the number of public Bank Holidays in each year (being 29 days not the 28 days referred to in Mr Garvey's statement).

9. The contract also records that the claimant was required to give the company one month's notice to terminate his contract of employment. It was common ground between the parties that the claimant was also entitled to one month's notice from the company.

10. On 3 February 2018 the claimant was given a warning letter. This is relevant to these proceedings only because it supported Mr Garvey's evidence that the issues he identified were those he saw whilst he was covering the claimant's three weeks absence in January 2018.

#### *Termination of employment*

11. On 16 September 2018 the claimant's employment was terminated with immediate effect by Mr Garvey, in a conversation with the claimant.

12. There is an evidential dispute between the claimant and Mr Garvey about what occurred prior to that date. The claimant's evidence was that his brother had died abroad the previous day, and his dismissal occurred on the day when he was informing Mr Garvey of this. Mr Garvey's evidence was that the claimant had been given four days' leave from 12-15 September arising from these personal circumstances. He had deferred the conversation as a result. On this issue I prefer the evidence of the claimant who I accept would be fully aware of the precise date of such a significant personal event.

#### *Wages*

13. What makes the claimant's deduction from wages claim particularly complex is that the claimant was partly paid by way of subs, that is cash taken when he asked to do so. This meant that the salary recorded on the claimant's payslips was not the amount transferred to the claimant's bank account each month. Instead, a large amount of his salary was taken in cash. This appears to have led to some of the area of dispute between the parties.

14. For the hearing, the respondent produced a series of slips signed by the claimant and others evidencing the sub payments made. The respondent has also produced a table showing the amounts paid. These include 19 separate sub payments made during August, totalling £1,370, and 12 separate payments made in this way in September, totalling £660.

15. The tribunal accepts that the documents shown do record the amounts paid to the claimant in subs taken by him. The table is accepted as being accurate. On that basis, the table shows that the claimant has been paid all basic pay (that is

instalments of his salary) due to him for the period up to the termination of his employment.

*Notice pay*

16. The last payslip which the claimant received records that he was paid £1,000 for holidays. Mr Garvey's evidence was that this was pay in lieu of notice of one month's basic salary and the wording used did not accurately describe what the payment was. I accept that was the case. Therefore, the claimant was paid in lieu of his basic salary for the notice period, albeit it was mis-recorded on the payslip provided.

*Redundancy pay*

17. The claimant gave evidence that Mr Garvey had also confirmed to him when they spoke on 16 September 2018, that he would receive £1,000 as a redundancy payment. This was part of the sums claimed by him. Mr Garvey denied this. Mr Garvey accepted that he may have used the word "redundant" in the conversation, in an attempt to make things easier for the claimant, but he was adamant that he would not have promised to make an additional payment to the claimant as he was unhappy with the claimant for reasons that he explained in the hearing. On this issue I accept Mr Garvey's evidence. The claimant was not entitled to any redundancy pay, and I do not believe that Mr Garvey would have promised to make a payment to him or one for this amount. Accordingly, the claimant is not contractually entitled to this amount claimed.

*Bonus*

18. In addition to the £1,000 per month basic salary, the claimant was also paid the additional amount described as a "performance salary" in the contract, and practically described by the witnesses as a bonus. This was based upon the occupancy of the respondent's hotel. There was some discussion about why this was paid, whether for: bookings made; or for occupancy and satisfaction. I accept Mr Garvey's evidence that it was for the latter and was paid for guests who attended rather than for sales. This is supported by the wording in the contract which records this as payable "*based upon the customer hotel bed nights*". The claimant was the hotel's manager and did not appear to have a significant sales role. The claimant's evidence was that he would use occupancy records to claim the bonus and, with only one identified exception, the amount he claimed each month he was paid.

19. An area of dispute is that the respondent paid the claimant a bonus of £312 for occupancy in September. This was calculated as at 12 September, Mr Garvey confirmed in evidence. The claimant contended that he was entitled to a bonus of £490 for occupancy in September, being an additional £178. Whilst he did not have the figures to hand, Mr Garvey accepted that this difference was likely to be explained by the gap between the 12 September date he had used to calculate what was due, and the 16 September termination date.

20. Under the contract, the claimant was entitled to this bonus calculated for occupancy up to 16 September 2019. This would be the case whether or not he was in work or on holiday for that period, he was still employed. As a result, the claimant

is entitled to be paid the additional £178 claimed, and the failure to do so was an unlawful deduction from wages made by the respondent.

*Pay in lieu of notice and bonus*

21. The claimant claims £1,200 for bookings for occupancy in the period between 16 September and 16 October 2018, that is in the month following the termination of his employment. Mr Garvey's evidence was that this was a bonus for the full servicing of the guests and as the claimant was not in work and was not employed, he was not entitled to receive the payment. As I have confirmed, I have found that contractually the claimant is not entitled to this amount as a payment for bookings alone, the bonus was paid for actual occupancy.

22. However, there is a question about whether the respondent was able to pay the claimant in lieu of notice by paying basic salary only (which it did), or whether the claimant was also contractually entitled to payment of the bonus which would have been payable had he been employed for that period. The contract itself is silent on pay in lieu of notice and what should be included in notice pay. Mr Garvey in his evidence did not provide anything which contradicted the £1,200 figure which the claimant confirmed in evidence was the bonus which would have been paid to him for occupancy in the period to 16 October 2018.

*Holiday pay*

23. Under the terms of the claimant's contract, holiday is based on a calendar year, albeit the claimant erroneously believed that his holiday was calculated on a 1 July to 30 June year. This error may reflect the fact that holiday appears to have been managed in a very relaxed and unrecorded way, perhaps consistent with the claimant being the manager of the respondent's hotel. However, in practice that has meant that there are very limited records about what holiday was taken and when.

24. I am satisfied from the evidence which I heard about the relaxed approach to the claimant's holiday requests, that the claimant was able to take his holiday entitlement in the year in which it fell if he wished to do so. There may have been some commercial considerations about when holiday would be expected/approved, however he was not precluded from taking it.

25. For holiday year 1 January 2018 to 16 September 2018, Mr Garvey's evidence was that the claimant took three weeks' leave at the start of 2018 and that he had covered this period of absence, evidenced by the letter I have referred to which he sent addressing issues which had been identified while the claimant was away. The claimant said he had taken only one week's holiday in January. On this issue I accept Mr Garvey's account as it was clearer than the claimant's confused recollection of when holiday was taken. However, I accept the claimant's evidence that he worked bank holidays and there was no evidence of any other dates being taken as leave in 2018. Mr Garvey did say in evidence that the claimant had often not been in attendance at work, but nothing records that as leave or paid leave.

## The law

26. As the claims are for sums which the claimant contends are due to him, the starting point for his claims are the terms of his employment contract (both express and implied). It is necessary to determine what, if any, sums were due to the claimant.

27. For the claims for unlawful deduction from wages, it is necessary to determine what wages were due and, if a sum was deducted, whether the respondent was entitled to make such a deduction.

28. The relevant law as it applies to breach of contract, is that an individual is entitled to be put in the position he would have been if the contract had been fulfilled. If the contract includes a provision which entitles the employer to pay in lieu of notice, if the employer chooses to pay in lieu of notice the contract has not been breached. As a result, the parties can agree in such a provision the amount which will be paid in lieu by, for example, agreeing that this will be basic pay only. Absent such a provision, an employee is entitled to receive the amount he would have received if he had been employed for the notice period. Here that will include any bonus which he would have received if he had been employed for the notice period and his contract had not been terminated in breach of contract.

29. For the claims for annual leave, the Working Time Regulations 1998 govern the minimum entitlements and the compensation due on termination of employment where employment is terminated during the leave year. The regulations provide that the parties can agree a leave year in a relevant agreement. Normally leave must be taken in the leave year to which it relates, there is nothing in the regulations which provides for carry over (although the cases have identified that leave can be carried over in certain situations where the employee is unable to take the leave). Regulation 14 provides the method for calculating leave in the final year, using the period of leave to which the employee is entitled, the proportion of the leave year expired, and the period of leave taken in that leave year.

30. The terms of an employment contract in relation to annual leave can apply, provided those terms are not in breach of the regulations. So, for example, if a contract has provision for carry over of leave, those terms may apply contractually. The claimant did not distinguish in his claim between a claim under the Working Time Regulations or as an unlawful deduction from wages claim, but the claim was considered on both basis.

## Discussion and analysis

31. For the issues in relation to wages, notice pay, redundancy pay and notice, the determination is confirmed in the fact section above.

### *Pay in lieu of notice and bonus*

32. The contract itself is silent on pay in lieu of notice and what should be included in notice pay. Accordingly, when the contract was terminated without notice, the contract was breached. The claimant is entitled to be put in the position he would have been had the contract been fulfilled. Had the claimant been employed for the contractual notice period, he would have received the bonus for occupancy during

that time. Accordingly, there was a breach of contract and the claimant is entitled to £1,200 for the bonus which would have been paid to him, had he been given the notice to which he was entitled under the contract.

*Holiday pay*

33. There is no contractual obligation to allow/enable carry over of holiday which I have been shown in the contract, and the Working Time Regulations do not allow for holiday carry over. In this case there is no reason why carry over should be allowed under the regulations. As a result, any holiday not taken in the year to 31 December 2017 was lost.

34. That means that the only relevant holiday year is the holiday year 1 January 2018 to 16 September 2018. As confirmed above, I have found that the claimant took three weeks' leave at the start of 2018, but not that any leave was taken in September immediately prior to termination. On the basis that the claimant was entitled to 29 days' holiday for the full calendar year, his pro rata entitlement to termination was 21 days. He had taken 15 days as at the date of termination. Accordingly, he was entitled to pay in lieu of six days accrued but untaken annual leave for that calendar year. Using the figure which the claimant uses in his claim form for a week's holiday/pay, the claimant is accordingly entitled to £300 for accrued but untaken annual leave as at termination.

*Other issues*

35. Where I am able, I have addressed the sums claimed by the claimant, albeit it is difficult to follow exactly what is claimed because of the way in which wages were taken. For the remaining issues in dispute I accept the evidence of the respondent that the sums have been paid.

36. I do not accept, as is suggested in Mr Garvey's witness statement, that the respondent's obligation to pay for accrued but untaken annual leave as at the termination date is negated by the fact that the claimant was not required to work his notice. The fact that the claimant was dismissed in breach of contract does not alter his entitlement to pay for accrued but untaken annual leave as at the termination date.

37. As recorded in the Judgment, the claimant is entitled to the three payments: £178 as a result of an unauthorised deduction from his wages for bonus due prior to termination; £1,200 as damages for breach of contract (as the amount due for lost bonus was not included in the payment made for notice); and £300 for accrued but untaken annual leave.

Employment Judge Phil Allen

Date: 12 November 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

20 November 2019

FOR THE TRIBUNAL OFFICE

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## NOTICE

### THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2400021/2019**

Name of case: **Mr V Martin** v **Garvey's Promenade Hotel**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **20 November 2019**

"the calculation day" is: **21 November 2019**

"the stipulated rate of interest" is: **8%**

For the Employment Tribunal Office